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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971.

WARREN PINTO, Superintendent, New Jersey State Prison Farm, Rahway, New Jersey,
Petitioner,

vs.

ESAW MITCHELL,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF AND APPENDIX FOR PETITIONER.

ANTHONY M. BEZICH,
Assistant Prosecutor,
Attorney for Petitioner.
JOHN P. JEHL,
Assistant Prosecutor,
On the Brief.

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JURISDICTION.

Judgment of the United States Court of Appeals for the Third Circuit was entered on February 3, 1971. The jurisdiction of the court is invoked under 28 U. S. Code §1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I. Whether the rule of *Griffin v. California* should be applied where a defendant testifies by taking part in a physical demonstration?

II. Whether the rule of *Griffin v. California* should be applied to cases where the trial, but not the direct appeal, had been completed before the date of that opinion?

CONSTITUTIONAL PROVISIONS INVOLVED.

CONSTITUTIONAL AMENDMENT 5:

"No person shall . . . nor shall be compelled in any criminal case to be a witness against himself . . ."

CONSTITUTIONAL AMENDMENT 14:

". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE.

Defendant, Esaw Mitchell, together with one Robert Lewis, was convicted by a jury in the Camden County, New Jersey Court, of rape, kidnapping, atrocious assault and battery and carrying a concealed deadly weapon. Seven people had participated in these crimes. Five had been apprehended at the scene of the crime and were tried and convicted together. Two others, defendant Mitchell and Robert Lewis, fled the scene of the crime and were apprehended several months later, after the other five had been convicted.

The crimes had been committed on February 2, 1963, in Winslow Township, New Jersey. The victims, Joseph Keskes and Jean M. Achey, were in a parked car when a vehicle occupied by five men and two women, including Esaw Mitchell, backed into the car occupied by Keskes and Miss Achey, locking bumpers (T 27, 41).

Defendant, Esaw Mitchell, then proceeded to punch Keskes and kick him about the head (T 30). Keskes shouted to Miss Achey to run, but she was unable to escape (T 86).

Miss Achey testified that Mitchell, along with three other men, dragged her back to the car with defendant Mitchell pushing her into the car (T 88). Miss Achey testified that she was raped in the car by four of the men, including Esaw Mitchell (T 95). When the police arrived at the scene, one of the men was in the act of raping Miss Achey (T 32, 33). Miss Achey testified that, as the police car approached, Robert Lewis and Esaw Mitchell ran away (T 48).

Concerning her identification of Esaw Mitchell, Miss Achey testified that he was taller and darker than the other men who had raped her and had a rounder face (T 102). This comparison of her attackers initiated an attempt by defense counsel for Mitchell to show a reasonable doubt concerning her ability to identify Mitchell. Raymond Forchion, one of the attackers convicted in the first trial, testified on behalf of Esaw Mitchell. When Forchion had finished testifying, defense counsel realized an opportunity to discredit the victim's testimony that Mitchell was taller and darker than the other attackers. He requested Mitchell to walk around and stand next to Forchion in the presence of the jury, which he did (T 152). Mitchell took no further part in the trial and did not testify in his own behalf.

In his summation, defense counsel stressed heavily upon the comparison of the two men; he stated:

> "Here's something that I hope some of you may recall concerning this identification. When Miss Achey was asked if she had given a description of the man whom she now says was Esaw Mitchell to the police, and she said yes, and when she was asked what description of Esaw Mitchell she had given, her description was he was taller than the rest of them, he was darker than the rest of them, and he had a round face. Now, I hope that at least some of you ladies and gentlemen will recall that that distinctly was the description which Miss Achey said she gave to the police of the man whom in court she identified as Esaw Mitchell.

"Now, when Raymond Forchion was produced by the defendant Robert Lewis, just before he left the stand you may recall also that I asked him to come down and stand beside Esaw Mitchell. I hope some of you recall that. Now, if there was any difference between the height of those two men, I wasn't able to see it. Of course, the Prosecutor asked Raymond Forchion if he had grown in height since the night of the attack, and he answered that he didn't know. Well, of course, I don't know either. I don't know whether Raymond Forchion has grown in height since the night of the attack, I don't know whether Esaw Mitchell has grown in height sin the night of the attack. But, certainly, I say to you, ladies and gentlemen, that there visibly—there wasn't enough difference between the height of Raymond Forchion and the height of Esaw Mitchell for us to say that that was significant, or that Esaw Mitchell was taller, even, than Raymond Forchion, and, of course, all of the co-defendants mentioned in the indictments weren't even here for comparison.

"As to whether Esaw Mitchell was darker than any of the rest, we don't know that, either. All of the defendants aren't here. Looking at them now, there is some little difference. Of course, it is a little difficult. I guess in the three of us, the two defendants and me, there is some difference in color, of course, but, whether there is enough for that to be significant, for that to stand out, in the dark—in the dark—and everybody says it was very dark that night, no lights—how anybody could say, even between the three of us, let alone between the five men that are supposed to have been there, how Esaw Mitchell was so much darker than anybody else, that that is what fits the fact that that man that night and Esaw Mitchell, the defendant, today, are one and the same person, I submit to you isn't significant.

"Whether he has a round face, that, of course, is a relative term, as you look at it, whether you call his face round. Now, of course, I have a round face. It seems to me if somebody v as going to identify me, they would say, 'He's got a fat face.' I think we can all agree on that. But, whether Esaw Mitchell's face is a round one, I don't know, but that was the description that Miss Achey gave of Esaw Mitchell.

"I ask you, from a description that he was darker than anybody else, that he was taller than anybody else, and that he had a round face, do you think such a description as that would permit any policeman, no matter how smart he was, to go and pick out a man?

"Finally, on this matter of identification, you ladies and gentlemen for five days now have had an opportunity off and on, at least, to look even at these two defendants—not five, but two. You have been sitting there, they have been sitting here. You have had an opportunity to look at them for almost five days, off and on, for five days, in the light. Now, I am wondering if some time when we had come in the courtroom they had changed places, so that Esaw Mitchell was sitting at the end of the table and Robert Lewis was sitting next to me, I am wondering if you would even notice it, if there is so much difference even between their appearance that it would stand out, in the light, and I ask you, ladies and gentlemen, whether there is enough difference between even just the two, not five, that in the dark that a difference could be seen to the point of permitting a positive identification.

"Now, ladies and gentlemen, that, I think, is really the crux of this case" (T 266-269).

In his summation, the Prosecutor made reference to the fact that defendant did not take the stand and that under the law the jury could infer that defendant could not deny

the evidence produced against him (T 307). The trial judge then charged the jury pursuant to New Jersey law existing at that time that they could infer from defendant's failure to testify that he could not deny the evidence against him (T 349).

After the judgment of conviction was entered, defendant was denied relief on direct appeal by the New Jersey Superior Court, Appellate Division, on April 26, 1966, and the New Jersey Supreme Court denied certification on November 15, 1966. A petition for habeas corpus to the United States District Court, District of New Jersey, was denied on May 16, 1968. The order of the District Court denying habeas corpus was reversed by the United States Court of Appeals on February 3, 1971, and this petition, on behalf of the State of New Jersey, for certiorari follows.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Court of Appeals in Reversing the District Court is in Conflict with New Jersey Decisional Law.

In *State v. Fioravanti*, 46 N.J. 109 (1965), the New Jersey Supreme Court held that *Griffin v. California*, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), which bars comment upon a defendant's failure to testify, would not be applied to a factual situation where the defendant took part in a physical demonstration before the jury that the trousers he allegedly wore at the scene of the crime did not fit him. The court reasoned, relying on *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917), that a defendant who undertakes to answer part of the evidence against him is subject to comment as to factual thrusts he does not meet. The same case was presented before the

Court of Appeals for the Third Circuit in *United States ex rel. Fioravanti v. Yeager,* 404 F. 2d 675 (3rd Cir. 1968), cert. den. 396 U. S. 860 (1969). The Court of Appeals in that case followed the reasoning of the New Jersey Supreme Court and held that comment upon defendant's failure to testify would be proper where he had communicated to the jury through a physical demonstration.

Thus, when the present case was presented to the New Jersey Superior Court, Appellate Division, that court relied upon *State v. Fioravanti,* supra, holding that defendant's act of offering himself for a comparison with one of the convicted attackers was a testimonial act thus permitting the comment on his failure to testify. The United States District Court, in denying habeas corpus, also relied upon *State v. Fioravanti,* supra.

The majority opinion filed by the Third Circuit in the present case, specifically repudiated the court's own opinion in *U. S. ex rel. Fioravanti v. Yeager,* supra, to the extent of any inconsistency with the present case.

In a dissenting opinion, filed in the present case, Judge McLaughlin urged that *Fioravanti* not be repudiated, stating:

> "The theory for reversal here must, not only rely on the proposition that Griffin governs the trial situation before us but also nullify Fiorvanti, an even stronger factual case in the same area as this appeal. The net result is to permit a totally vulnerable, concocted defense maneuver to avoid having the defendant sworn as a witness and thus subject himself to a proper and devastating cross-examination. In its stead, as was done in this trial and in Fiorvanti, the defendant visually and orally through his attorney, projects his sole affirmative defense to the jury, untouched and, according to the court opinion, untouchable by the prosecutor. I venture to suggest that this is a giant step backward in the administration of justice in the federal courts.

> I think it very clear that Mitchell's Fifth Amendment rights were not violated at his trial. I would affirm the judgment of the district court."

It is therefore respectfully submitted that a writ of certiorari should be granted because the Third Circuit Court of Appeals has rendered a decision on an important matter which is in conflict with the applicable law of the State of New Jersey.

II. The Rule of Griffin v. California Should Not Be Applied Retroactively to Cases Tried Before That Decision Was Handed Down.

Defendant was found guilty on June 15, 1964. At that time the law governing the New Jersey courts on comment was *State v. Corby,* 28 N. J. 106 (1958), and New Jersey Revised Statute N. J. S. A. 2A:84A-17(4), which permitted comment by the prosecutor and trial judge on a defendant's failure to testify. On April 28, 1965, it was held, in *Griffin v. California,* 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 106, that such comment violates the federal privilege against self-incrimination which had been made applicable to the states by *Malloy v. Hogan,* 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 653, which had been decided on June 15, 1964, the day defendant was convicted. The trial judge's comment on defendant's failure to testify was made on the same day, the comment by the prosecutor was made on June 12.

In *Tehan v. United States,* it was held that the *Griffin* rule would not be applied retroactively because, ". . . the Fifth Amendment's privilege against self-incrimination, is not adjunct to the ascertainment of truth." 86 S. Ct. 459, 465 (1966).

Under the particular facts of the *Tehan* case, the defendant had exhausted all possible appeals before *Griffin* was

decided. In the present case, defendant's direct appeal was still pending at the time *Griffin* was decided. Therefore, the lower courts have held *Griffin* to be applicable because of footnote 3 in *Tehan*, which provides in part:

> "Nor is there any question of the applicability of the Griffin rule to cases still pending on direct review at the time it was announced."

It is submitted that the same reasons should apply to all cases tried before *Griffin*, regardless of the status of appeals. In the present case, the State relied upon the law as it existed at the time of trial and the comments by the prosecutor and the court did not violate constitutional protections designed to ascertain truth at trials, but rather values reflecting the concern of society for the right of an individual to be left alone.

Therefore, it is respectfully requested that a writ of certiorari be granted so that the Court may reconsider whether *Griffin* should be applied retroactively to cases where all appeals had not been exhausted.

CONCLUSION.

It is respectfully requested that a writ of certiorari be issued to review the conflict between New Jersey and federal case law concerning the right of comment on failure to testify where defendant takes part in demonstrations before the jury and to reconsider the retroactivity of *Griffin v. California.*

Respectfully submitted,

ANTHONY M. BEZICH,
Assistant Prosecutor,
Attorney for Petitioner.
JOHN P. JEHL,
Assistant Prosecutor,
On the Brief.

APPENDIX A (1).

OPINION OF SUPERIOR COURT OF NEW JERSEY.

STATE OF NEW JERSEY,
Plaintiff-Respondent,
vs.
ESAW MITCHELL,
Defendant-Appellant.

Argued February 17, 1966—Decided Apr. 26, 1966.

Before: JUDGES GAULKIN, LABRECQUE and BROWN.

MR. FRANCIS S. MUNYON, assigned counsel, argued the cause for the Defendant-Appellant.

MR. RUDOLPH J. ROSSETTI, Assistant Prosecutor, argued the cause for the Plaintiff-Respondent (MR. NORMAN HEINE, Camden County Prosecutor, attorney; MR. EDWARD A. COLLIGAN, on the brief).

PER CURIAM.

Defendant was convicted of rape, kidnapping, atrocious assault and battery, and carrying a concealed weapon. Seven people allegedly participated in the commission of

these crimes. Five were apprehended at the scene of the crimes but two fled. The two were Robert Lewis and Esaw Mitchell. They were apprehended some months later and returned to New Jersey for trial. In the meantime, the other five had been tried and convicted.

Lewis and Mitchell were tried together. Lewis testified in his own behalf but Mitchell did not. On the day that the court charged the jury the United States Supreme Court rendered its decision in *Malloy v. Hogan,* 378 U. S. 1, 12 L. ed. 2d 653 (1964). Unaware of this decision, the judge charged the jury in accordance with *State v. Corby,* 28 N. J. 106 (1958), as follows:

> "In this case the defendant, Esaw Mitchell, chose not to take the witness stand. A defendant in a criminal proceeding may testify in his own behalf if he so desires, although he cannot be compelled to be a witness against himself, but when the accused is upon trial and the evidence tends to establish facts which if true would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness, if the facts be not true, then by his silence the jury may infer that he could not truthfully deny the charge."

There was no objection to this charge by defendant.

Under *Malloy* and *Griffin v. California,* 380 U. S. 609, 14 L. ed. 2d 106 (1965), such a charge is now ordinarily forbidden, and in *State v. Lanzo,* 44 N. J. 560 (1965), the Supreme Court held that the benefits of *Malloy* and *Griffin* are to be given to all defendants whose cases are before the courts on direct appeals from judgments of conviction, even though the issue was not raised at the trial. However, we hold that here the record presents justification for the charge given, and we therefore affirm.

Raymond Forchion, one of the five previously convicted, took the stand on behalf of defendant Lewis. On cross-examination, counsel for Mitchell attempted to demonstrate what he claimed to be the marked physical similarity between Mitchell and Forchion, in order to prove that the victim was mistaken when she identified Mitchell as one of the rapists.

To demonstrate this similarity, counsel asked Mitchell to arise from his chair, walk around and stand before the jury. He then had Forchion come down from the witness stand and place himself beside Mitchell before the jury. However, it developed upon further examination of Forchion that at the time of the crime Mitchell had "processed" hair (which apparently he did not have at the time of the trial) and that his hair was longer on the day of the crime than it was on the day of the trial. "Processed" hair is hair that has been straightened by some treatment. Even though there was testimony other than that of the victim which implicated defendant, his attorney stressed the alleged similarity at length in his summation, concluding, "Now, ladies and gentlemen, that, I think, is really the crux of this case."

It seems to us that this brought the case within the rule enunciated in *State v. Fioravanti*, 46 N. J. 109 (1965). There, as here, defendant did not take the stand, and the trial court gave the *Corby* charge. The police claimed that they had taken a pair of trousers from Fioravanti upon which had been found bits of paint from the safe which had been forced open. Fioravanti put on the trousers and walked before the jury to demonstrate the fact that they did not fit him. In upholding the conviction despite *Griffin* and *Malloy*, the Supreme Court ruled that Fioravanti's conduct was a testimonial act. Implicit in his act was a nonverbal assertion that the trousers were not his and that his physical characteristics, such as the measurement of his waist, had not been changed since the commission of the

crime. The Supreme Court held that thus Fioravanti had undertaken to answer part of the evidence against him. Therefore, said the court, the *Corby* charge was justified.

In the instant case, Mitchell's election to stand before the jury and to call upon Forchion to stand alongside of him for a comparison was a testimonial act. He thus impliedly informed the jury that his physical characteristics, such as his height and weight, were similar to those of Forchion on the date of the crime; that his hair was then like Forchion's, short and not "processed"; that neither he nor Forchion had changed in appearance from the time of the crime to the time of the trial; and that the victim must have mistaken him for Forchion.

Furthermore, in his summation Mitchell's counsel argued that Mitchell had taken flight after the crime not because of guilt but because of fear. He said:

> "I am wondering, why did he run? I am wondering, and I think you ladies and gentlemen should consider, did he run because he was guilty, or did he run because he was afraid, because of fear?
>
> Now, you say, 'Well, what did he have to be afraid of, if he hadn't done anything?' I am sure that is a question in your minds.
>
> * * * * * * * *
>
> I probably, having lived as long as I have in Camden County, having had the experience that I have had in Camden County, knowing the fairness of our Judges here in Camden County, having become convinced of the fairness of our jurors here in Camden County, I, too, would have given myself up, confident that I would get a fair trial.
>
> But, Esaw Mitchell is not one of you. Esaw Mitchell, unfortunately, does not have my experience and my contacts. Esaw Mitchell, at that time an eighteen-year-old boy, unskilled, untrained, without anything, who can say that the fear of being tied up in this terrible

> thing didn't actually paralyze his brain, his thinking facilities, to a point where he thought the best thing for him to do would be just try to keep out of it rather than to go back and stand a chance of getting a fair trial. Now, isn't there a question about that? I think you ladies and gentlemen all know what I mean when I say that."

Counsel thus indicated to the jury that defendant would have so testified had he taken the stand. In *United States v. Feinberg,* 140 F. 2d 592, 595 (2d Cir.), *cert. denied,* 322 U. S. 726, 88 L. ed. 1562 (1944), Judge Learned Hand, writing for the court, held that a summation to a jury inviting consideration of what defendant might have said had he testified opens the door for comment in reply upon defendant's failure to take the stand. See also *Babb v. United States,* 351 F. 2d 863, 867-68 (8th Cir. 1965).

For the foregoing reasons, we hold that the giving of the *Corby* charge in the case at bar does not constitute reversible error. The judgment is affirmed.

APPENDIX A (2).

OPINION OF SUPREME COURT OF NEW JERSEY.

STATE OF NEW JERSEY, Plaintiff-Respondent, vs. ESAW MITCHELL, Defendant-Appellant.	ON MOTION FOR LEAVE TO APPEAL AS AN INDIGENT.

This matter having been duly presented to the Court, it is Ordered that the Motion for leave to appeal as an indigent be considered a petition for certification and denied for want of merit.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 15th day of November, 1966.

/s/ JOHN H. GILDEA, Clerk.

Filed November 15, 1966.
JOHN H. GILDEA.

APPENDIX A (3).

UNITED STATES DISTRICT COURT.
DISTRICT OF NEW JERSEY.

UNITED STATES OF AMERICA, EX REL. ROBERT LEWIS, No. 42061, Petitioner, v. HOWARD YEAGER, Principal Keeper of The New Jersey State Prison, Respondent, and	Civil No. 465-67. MEMORANDUM AND ORDER.
UNITED STATES OF AMERICA, ex rel. ESAW MITCHELL, No. 42060, Petitioner, v. WARREN PINTO, Superintendent, New Jersey State Prison Farm, Rahway, New Jersey, Respondent.	Civil No. 671-67. MEMORANDUM AND ORDER.

MADDEN, District Judge:

Petitioners, Esaw Mitchell and Robert Lewis, each seek the issuance of a writ of habeas corpus pursuant to 28 U. S. C. 2241, et seq., alleging that they are unlawfully confined in the New Jersey State Prison by virtue of sentences of imprisonment imposed by the Camden County Court.

The petitioners each filed separate petitions but the Court will dispose of them in this one opinion.

Petitioner Esaw Mitchell asserts that he was denied his privilege against self-incrimination by reason of the prosecutor's and the trial court's comment on his failure to testify at trial.

Petitioner Robert Lewis asserts that at his trial the reading into evidence of an unsigned statement of a defense witness during cross-examination amounted to constitutional error, that a previously convicted co-defendant testifying for the State was the only witness to place petitioner at the scene of the crime and that he received consecutive sentences for a single criminal transaction in contravention of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The petitioners, Esaw Mitchell and Robert Lewis, were tried together and were convicted of rape, kidnapping, atrocious assault and battery, and carrying a concealed weapon. Before petitioners' trial, five other of the seven defendants charged with the commission of these crimes had been tried and convicted. Petitioners were subsequently apprehended and tried together, each represented by counsel.

At this point the Court feels compelled to express a few general thoughts in reviewing this matter after reading and attempting to analyze the two petitions and trial transcript of 361 pages covering six days from June 8th to June 15th, 1964, inclusive.

The Court factually recognizes that this was an emotionally packed situation where five boys and two girls of one race were accused of coming upon a parked car wherein a boy and girl of another race were parked and they allegedly attacked the boy, beat him up, and took the girl away from him, dragged her to their car where they allegedly assaulted and raped her. Five of the defendants, including the two girls, were apprehended immediately and tried

some considerable time prior to the trial of the present petitioners. This was a second trial of the same offense by the petitioners-defendants who had not been apprehended and could not be brought to trial sooner.

The important thing in the review of the transcript of this trial is an impression that the trial judge was making an extreme effort at fair and equitable conduct of the course of the trial, that it be kept on an even keel, and that the courtroom be strictly a forum for factual disposition of alleged violation of the law. If it is this Court's place to comment upon a trial court's conduct, this Court feels that the trial court's conduct under consideration here was eminently fair and any now alleged violations of the constitutional rights of the defendants were precipitated in the main by the defendants or their counsels' comments or actions.

The Court will treat the petition of Esaw Mitchell first.

At trial, Robert Lewis testified in his own behalf but Esaw Mitchell did not. Raymond Forchion, one of the five people previously convicted, took the stand on behalf of Robert Lewis. On cross-examination, counsel for Esaw Mitchell attempted to demonstrate what he claimed to be the marked physical similarity between petitioner, Esaw Mitchell, and Forchion in order to prove that the rape victim was mistaken when she identified petitioner, Esaw Mitchell, as one of the rapists.

To demonstrate this similarity, counsel asked Esaw Mitchell to arise from his chair, walk around, and stand before the jury. He then had the witness, Forchion, come down from the witness stand and place himself beside petioner before the jury. As part of its instructions to the jury the trial court charged:

> "* * * A defendant in a criminal proceeding may testify in his own behalf if he so desires, although he cannot be compelled to be a witness against himself, but when the accused is upon trial and the evidence

> tends to establish facts which if true would be conclusive of his guilt of the charge against him, and he can disprove them by his own oath as a witness, if the facts be not true, then by his silence the jury may infer that he could not truthfully deny the charge."

During summation defense counsel (see page 273 of transcript) and the prosecutor (see page 305 of transcript) also commented on petitioner's failure to testify. The jury returned a guilty verdict.

The trial judge's and the prosecutor's comments were in accordance with *State v. Corby*, 28 N. J. 106 (1958), which was the existing law at the time of petitioner's trial (June 8, 9, 10, 11, 12 and 15, 1964).

Petitioner Esaw Mitchell appealed his conviction, on the same grounds now presented to this Court, to the Superior Court of New Jersey, Appellate Division, which denied petitioner's application on April 26, 1966. The New Jersey Supreme Court denied certification on November 15, 1966. Petitioner then sought and was denied post-conviction relief from the Courts of New Jersey. Petitioner has exhausted his available State Court remedies pursuant to 28 U. S. C. 2254, and his petition is, therefore, properly before this Court.

The petition of Esaw Mitchell presents the question of whether an accused, tried in June of 1964, who, of his own volition, undertakes a demonstration before a jury in order to show he had been mistakenly identified by the victims of a crime, is subject to comment by the trial judge and/or prosecutor that he did not take the witness stand, thereby allowing the jury to consider his failure to deny inculpating facts.

The charge of the Court, now under attack, was given at a time when the federal law had been enunciated in *Caminetti v. U. S.*, 242 U. S. 470 (1917). This law was fol-

lowed by the Courts of New Jersey in *State v. Corby*, 28 N. J. 106 (1958) to such an extent that it was eventually molded into a statute of the State of New Jersey, N. J. S. 2A:84A-17(4), and used by the Courts of the State of New Jersey and was actually the law of the land at the time the charge was given. It was changed subsequently by *Griffin v. State of California*, 380 U. S. 609 (1965).

The difficulty of the learned trial judge attempting to prepare his charge during the course of a trial is made the more obvious when one recognizes at the time of the charge in the case under consideration the law was one thing and since then *Griffin v. State of California* has held that the court or prosecutor cannot make comment on the failure of the defendant to testify; later the Supreme Court, in *Tehan v. U. S.*, 382 U. S. 406, decided January 19, 1966, two years subsequent to our present matter, held that *Griffin* will not be applied retrospectively but would apply to cases on direct review. See footnote on page 409. However, this Court is of the opinion that the factual circumstance in the present petition is such that *Griffin v. State of California* is not applicable.

The Court is in complete accord with the Supreme Court of New Jersey wherein it said, in *State v. Fioravanti*, 46 N. J. 109 (1965), concerning demonstrative evidence, at page 120:

> "* * * But when a defendant himself undertakes a demonstration which is intended to refute a part of the State's evidence, he may go beyond being a mere neutral, inert subject of a comparison and become the communicant of a testimonial claim. So here, while a police officer testified he took the trousers from Fioravanti, Fioravanti by his demonstration said this was not true; that the trousers were not his; and that the falsity of the officer's testimony is demonstrated by the fact that the trousers obviously did not fit not-

withstanding that defendant's weight at trial is the same as it was at the time of the arrest. All of this was necessary for the point defendant sought to make by his nonverbal communication. Without his assertion with respect to an inherent variable, a subject within his own control, i.e., his weight, the demonstration could mean nothing."

The petitioner-defendant's demonstration in this instance, which amounted to an attempt to refute a part of the State's evidence, consisted of his attempt to demonstrate to the jury what he claimed to be the marked physical similarity between himself and the previously convicted defense witness, Raymond Forchion, in order to prove that the victim was mistaken when she identified petitioner, Esaw Mitchell, as one of the rapists.

This Court, therefore, holds that where a defendant, while not actually assuming the stand and testifying during the course of the trial, indulges in demonstrative conduct which, in effect, puts into issue the truthfulness or correctness of the State's case against him, he thereby opens the door for *fair comment* by the trial judge and prosecutor under the *Caminetti* decision; and that the action of the defendant in this particular instance invited such comment by the trial judge, which comment was not unfair or unwarranted especially when a review of the transcript in the matter discloses that the defense counsel argued for three pages of the transcript regarding the identification of the defendant, Mitchell, and the defendant's witness, Forchion, and, in effect, was the first to comment upon the defendant's failure to take the stand.

For the reasons herein noted, no conduct of the trial judge in this matter is seen to be unfair in the constitutional sense.

The application of petitioner, Esaw Mitchell, is denied.

The Court will next treat the petition of Robert Lewis.

As has been previously stated, a convicted co-defendant, Raymond Forchion, took the stand at trial as a defense witness for Robert Lewis. On cross-examination, the prosecutor made use of an unsigned statement of defense witness Forchion, which, in part, described Robert Lewis' participation in the charged offenses.

Petitioner, Robert Lewis, alleges in his petition that he is being illegally detained for the reasons that the use of this statement amounted to constitutional error, and that he received consecutive sentences for a single criminal transaction, and that a previously convicted co-defendant was the only witness to place petitioner at the scene of the crime.

Petitioner appealed his convictions of rape, kidnapping, atrocious assault and battery, and carrying a concealed weapon, on the same grounds presented here, to the New Jersey Superior Court, Appellate Division. The Superior Court affirmed the convictions of rape, kidnapping, and atrocious assault and battery, but, remanded the case to the trial court for *resentencing* upon the rape and kidnapping counts. However, the Superior Court did not consider the validity of the conviction for carrying a concealed weapon, reasoning that the sentence on this charge was concurrent with the much longer terms imposed on the other charges. The New Jersey Supreme Court affirmed the Superior Court, Appellate Division, except as to the failure of the Appellate Division to consider the validity of the conviction for carrying a concealed weapon, and, as to that issue, the matter was remanded for consideration and disposition. On remand, the Appellate Division reversed the judgment of conviction for carrying a concealed weapon and entered a judgment of acquittal.

Petitioner has sufficiently exhausted his State remedies, as required by 28 U. S. C. 2254, even though no post-con-

viction relief was sought in New Jersey Courts. This requirement is satisfied when a conviction is appealed unsuccessfully through at least one branch of the State Appellate process on the same grounds advanced here, since the State thereby has been afforded the initial opportunity to cure alleged constitutional defects in its administration of criminal justice. See *Fay v. Noia*, 372 U. S. 391 (1963).

With respect to petitioner's allegation that the use of an unsigned statement of a defense witness during cross-examination amounted to constitutional error, the Court notes that the trial judge cautioned the jury in a lengthy instruction that the only purpose of the introduction of the statement or permitting questions to be asked concerning the statement was to effect the credibility of the particular defense witness, Raymond Forchion. This Court finds no constitutional error; the use of the statement for impeachment purposes only was within the scope of proper cross-examination.

The record contradicts petitioner's allegation that he received consecutive sentences for a single criminal transaction.

The trial court had originally sentenced petitioner to consecutive sentences of 30-35 years (kidnapping carries a minimum sentence of 30 years, N. J. S. A. 2A:118-1); 14-15 years for rape, and 6-7 years for atrocious assault and battery; a total sentence of 50 to 57 years. As a consequence of the New Jersey Superior Court's Appellate Division, decision to remand the case to the trial court for resentencing, petitioner is presently under sentences totaling 36 to 42 years. Petitioner was resentenced to 14 to 15 years for rape to run concurrently with a sentence of 30 to 35 years for kidnapping, and, in addition, was sentenced to a consecutive term of 6 to 7 years for atrocious assault and battery. It is the imposition of the consecutive sentence for atrocious assault and battery which petitioner,

Robert Lewis, alleges contravenes the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The record reveals that petitioner's sentence for atrocious assault and battery is distinct from the sentences imposed for kidnapping and rape, in that a male was the victim of the atrocious assault and battery and that a female was the victim of the kidnapping and rape. The Court finds no merit in petitioner's allegation that he received a consecutive sentence for a single criminal transaction.

The petitioner's remaining allegation, that a previously convicted co-defendant testifying for the State was the only witness to place petitioner at the scene of the crime, is not of proper constitutional dimension to merit habeas corpus relief.

For the reasons noted, the application of petitioner, Robert Lewis, is denied.

Wherefore, it is on this 16th day of May, 1968 ORDERED that the petition of Esaw Mitchell for a writ of habeas corpus be and the same is hereby denied.

It is, likewise, ORDERED on this 16th day of May, 1968, that the petition for a writ of habeas corpus filed by Robert Lewis be and the same is hereby denied.

The Court is of the opinion that a Certificate of Probable Cause is warranted in the matter of *U. S. A., ex rel. Robert Lewis v. Howard Yeager,* Civil No. 465-67, and, also, in the matter of *U. S. A., ex rel. Esaw Fitchell v. Warren Pinto,* Civil No. 671-67. Upon appropriate applications having been made, Certificates of Probable Cause will be deemed to have been granted.

THOMAS M. MADDEN,
Judge, U. S. District Court.

APPENDIX A(4).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 17,359

UNITED STATES OF AMERICA
ex rel. ESAW MITCHELL #42060, *Appellant*
v.
WARREN PINTO, Superintendent,
New Jersey State Prison Farm,
Rahway, New Jersey

(D. C. Civil Action No. 671-67)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted on Briefs September 22, 1969

Before HASTIE, *Chief Judge*, and

MCLAUGHLIN *and* VAN DUSEN, *Circuit Judges*

Rehearing En Banc October 13, 1970

Before HASTIE, *Chief Judge*, and MCLAUGHLIN, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT, ADAMS and GIBBONS, *Circuit Judges*

OPINION OF THE COURT.

(Filed February 3, 1971)

HASTIE, *Chief Judge.*

The district court denied relief to the appellant, a state prisoner serving a sentence under a New Jersey rape conviction, who sought a writ of habeas corpus on the ground that at his trial his failure to testify had been used against him in violation of his privilege against self-incrimination. Both the prosecutor and the trial judge had told the jury that the failure of the accused to testify might be used as evidence against him.

In 1965, the Supreme Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U. S. 609, 615. The Appellant's conviction occurred on June 15, 1964, but the case was still pending in the New Jersey courts on direct appeal in 1966. This chronology impels us to consider preliminarily whether the rule of the *Griffin* case applies to this case.

Tehan v. Shott, 1966, 382 U. S. 406, holds that the *Griffin* rule does not control cases in which conviction had become final before the *Griffin* decision. But at the same time a situation indistinguishable from the present case was before the Court in *O'Connor v. Ohio*, 1965, 382 U. S. 286 and was remanded for reconsideration in the light of *Griffin*. Later, O'Connor's case was reviewed again, 1966, 385 U. S. 92, and the Court made explicit the reach of *Griffin*, saying:

> "[I]t is clear the prospective application of that [*Griffin*] rule, announced in *Tehan v. Shott*, 382 U. S. 406, does not prevent petitioner from relying on *Griffin*, since his conviction was not final when the decision in *Griffin* was rendered. Indeed, in *Tehan* we cited our remand of petitioner's [O'Connor's] case as evidence that *Griffin* applied to all convictions which had not become final on the date of the *Griffin* judgment, 382 U. S. at 409, n. 3." 385 U. S. at 93.

To the same effect, in *Johnson v. New Jersey*, 1966, 384 U. S. 719, 732, the Court said:

> "Decisions prior to . . . *Tehan* had already established without decision that . . . *Griffin* applied to cases still on direct appeal at the time . . . [it was] announced. See . . . 382 U. S. at 409, n. 3."

Thus, the 1965 constitutional pronouncement in *Griffin* is applicable to Mitchell's conviction which did not become final until 1966.

Indeed, in the unreported decision of the New Jersey Superior Court, Appellate Division, sustaining Mitchell's conviction, the court recognized that the *Griffin* rule was applicable. *Accord, State v. Lanzo*, 1965, 44 N. J. 560, 210 A. 2d 613. The conviction was sustained on the theory, to be discussed later in this opinion, that Mitchell had waived his privilege against self-incrimination.

We now consider whether the conduct of the judge and the prosecutor at appellant's trial were inconsistent with the *Griffin* rule. At that time the law of New Jersey permitted such comment and such a charge as the *Griffin* decision was soon to proscribe. Accordingly, in his argument to the jury defense counsel anticipated unfavorable comment by the prosecutor and in the judge's charge upon his client's failure to testify. He told the jury that it was on his advice that the accused had elected not to testify and argued that no unfavorable inference should be drawn from that circumstance. His anticipation was well founded,

for in his summation the prosecutor told the jury: "you are entitled also under the law of this state to consider if you desire, that Esaw Mitchell's failure to take the stand was because he couldn't deny the incriminatory evidence proved against him. . . ." Thereafter, the court charged the jury that ". . . by his silence the jury may infer that he [the accused] could not truthfully deny the charge." Thus, both the judge and the prosecutor did precisely what the *Griffin* decision holds they may not do without prejudicial violation of a fundamental constitutional privilege of the accused. However, the appellee attempts to avoid this conclusion by arguing that the conduct of the accused and his counsel during the course of the trial should be given effect as a waiver of his privilege against self-incrimination.

In *Caminetti v. United States*, 1917, 242 U. S. 470, 494-95, the Supreme Court held that when an accused takes the stand and testifies to refute part of the proof against him, his silence with regard to other damaging evidence as to matters within his knowledge is subject to adverse comment. In the present case, Mitchell neither testified nor called any witness. However, at the request of his counsel during cross-examination of a witness called by a co-defendant, Mitchell rose and stood before the jury next to the witness, who himself had previously been convicted as a participant in the crime of which defendant was now accused, to demonstrate a resemblance. The appellee characterizes this participation in a demonstration as a "testimonial act," equivalent to the defendant's verbal testimony in the *Caminetti* case. It is argued that this demonstration is like testimony in that it was intended to refute the state's evidence against the accused. But all relevant evidence introduced by the defense, whether demonstrative or verbal, is at least intended to refute the state's proof. This common purpose does not justify characterizing a physical demonstration as "testimonial." Moreover, technically Mitchell rested without offering any evidence whatever.

The demonstration in question occurred during cross-examination of a witness called by another party.

In applying the Self-Incrimination Clause of the Fifth Amendment, the Supreme Court has recognized a controlling distinction between real or physical evidence obtained from a defendant's person and that which is testimonial. The Court has upheld action by the state compelling an accused to submit to blood tests, *Schmerber v. California*, 1966, 384 U. S. 757; to try on clothing, *Holt v. United States*, 1910, 218 U. S. 245, and to exhibit his person for observation, *United States v. Wade*, 1967, 388 U. S. 218. In addition, the Court has cited with approval cases holding that the privilege against self-incrimination "offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *United States v. Wade, supra*, at 223, quoting from *Schmerber v. California, supra*, at 764. In the present case, the prosecution would clearly have had the right, if it so desired, to require Mitchell to rise from his seat and stand next to the witness then under cross-examination for comparison by the jury. The Self-Incrimination Clause would not have precluded such compulsion precisely because the evidence compelled was not testimonial or communicative. By the same token, voluntary participation by a defendant in such non-testimonial conduct cannot properly be analogized to such testifying as occurred in the *Caminetti* case.

In *State v. Fioravanti*, 1965, 46 N. J. 109, 215 A. 2d 16, the Supreme Court of New Jersey reasoned that by engaging in a courtroom demonstration an accused implicitly asserts that such variable conditions as height, weight, and hair style have not changed since the date of the crime. But the jury may find the demonstration probative without any such assurance from the demonstrator. Moreover, if

an accused, by merely engaging in a courtroom demonstration, is said to testify that his appearance has remained unchanged, then he is likewise forced to testify concerning the constancy of his appearance when he is compelled by the state to make such a demonstration. But such is not the case. See *Wade, Schmerber, Holt, supra.* The defendant does not testify in either situation. The constancy of his appearance is an inference which the jury may or may not draw from the introduction of the physical evidence itself and is as readily drawn when the presentation of this evidence is by the prosecution as when it is by the defense. In addition, this inference can be rebutted specifically by evidence of a change in the defendant's appearance or by argument during summation.[1] In no case should it be given effect as opening the door for a general instruction making the defendant's failure to testify evidence of guilt.

It must be recognized that the foregoing analysis and the conclusion to which it leads seem to contradict the rationale of this court's recent per curiam opinion in *United States ex rel. Fioravanti v. Yeager,* 1968, 404 F. 2d 675. To the extent of such inconsistency, the reasoning of the *Fioravanti* opinion will not be followed.

The appellee makes a separate contention that the comments by the prosecutor and the charge of the trial judge were proper responses to defense counsel's own comments on Mitchell's failure to testify. We disagree.

In *Griffin,* the Supreme Court held that the silence of an accused in a criminal action "shall not create any presumption against him." *Griffin v. California, supra,* at 613, quoting from *Wilson v. United States,* 1892, 149 U. S. 60, 66. The comments of Mitchell's counsel in his summation

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[1] The prosecution in fact did stress that despite the similarity of appearance between Mitchell and the witness, the victim had positively identified Mitchell as one of her attackers.

were intended to explain to the jury why Mitchell's failure to testify was not indicative of guilt and should be disregarded. As such, they were in accord with the basic principle enunciated in Griffin and were intended to serve the same salutary purposes as the present New Jersey rule that a defendant in a criminal action is entitled to an instruction that his silence be disregarded. *State v. Smith,* 1968, 100 N. J. Super. 420, 242 A. 2d 49. A correct statement by defense counsel that no unfavorable inference should be drawn from the failure of the accused to testify does not open the door for responses which incorrectly and prejudicially characterize the defendant's silence as evidence of guilt.[2]

It merits mention at this point that the instant case does not present a situation where the prosecutor only incidentally alluded to defendant's failure to take the stand without characterizing it as evidence of guilt. Such an indirect, limited reference has at times been viewed as harmless, particularly if defense counsel has already brought the accused's silence to the attention of the jury.[3] In the present case, the prosecutor, rather than incidentally indicating that Mitchell had failed to take the stand, direcly characterized Mitchell's silence as a circumstance that could properly be weighed as evidence of his guilt.

Similarly and even more clearly, the instruction of the trial court cannot be considered a permissible response to

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[2] It has already been stated that, as a matter of trial tactics, defense counsel merely offered an anticipatory refutation of such comment as was prosecutors' wont under sanction of New Jersey law at the time of trial.

[3] See **United States v. Heithaus,** 3d Cir. 1967, 377 F. 2d 484; **United States v. Hephner,** 7th Cir. 1969, 410 F. 2d 930; **United States ex rel. Miller v. Follette,** 2nd Cir. 1968, 397 F. 2d 363; **Babb v. United States,** 8th Cir. 1965, 351 F. 2d 863; **United States v. Stromberg,** 2nd Cir. 1959, 268 F. 2d 256; **Scanlon v. United States,** 1st Cir. 1955, 223 F. 2d 382; **Baker v. United States,** 8th Cir. 1940, 115 F. 2d 533.

the comments of Mitchell's counsel. Research has not disclosed any case in which comments by defense counsel that the defendant's failure to take the stand should not be considered evidence of guilt have been held to open the door for an otherwise improper contrary instruction such as the *Griffin* case has outlawed. Indeed, many of the cases allowing the prosecutor to respond to comments by defense counsel rely, at least in part, on the fact that the court gave a subsequent remedial instruction emphasizing that the defendant's silence must be disregarded. *See U. S. ex rel. Miller v. Follette, United States v. Heithaus, Babb v. United States,* and *Baker v. United States,* all cited Note 3, *supra.* In any event, "[w]hat the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Griffin v. California, supra,* at 614.

The present petitioner is entitled to relief by way of habeas corpus because the instruction by the trial court violated the Self-Incrimination Clause of the Fifth Amendment as authoritatively interpreted in the *Griffin* case. Perhaps somewhat less damaging, but also of constitutional proportions, was the error committed in permitting the prosecutor to characterize the defendant's silence as significant evidence of guilt.

The judgment of the district court will be reversed with direction that a writ of habeas corpus shall issue. But the state shall be privileged to retry the accused within a reasonable time, and pending such retrial, to follow the normal bond procedures applicable to such a defendant.

ADAMS, *Circuit Judge,* concurring.

I concur with that portion of the majority's opinion that holds Griffin v. California, 380 U. S. 609 (1965), applicable

to the charge of the trial judge permitting the jury to infer from the silence of the accused "that he could not truthfully deny the charge."

The statements made by the prosecutor, however, present in part a different problem, and in my judgment require a more detailed recitation of the events at the trial. Mitchell's primary defense at his trial was that he left the scene before the victim was raped, and that the victim thereafter mistook a previously convicted participant, Raymond Forchion, for Mitchell. In his closing argument, Mitchell's counsel stated with respect to the identification of Mitchell:

> "Here's something that I hope some of you may recall concerning this identification. When Miss Achey was asked if she had given a description of the man whom she now says was Esaw Mitchell to the police, and she said yes, and when she was asked what description of Esaw Mitchell she had given, her description was he was taller than the rest of them, he was darker than the rest of them, and he had a round face. Now, I hope that at least some of you ladies and gentlemen will recall that that distinctly was the description which Miss Achey said she gave to the police of the man whom in court she identified as Esaw Mitchell.
>
> Now, when Raymond Forchion was produced by the defendant Robert Lewis, just before he left the stand you may recall also that I asked him to come down and stand beside Esaw Mitchell. I hope some of you recall that. Now, if there was any difference between the height of those two men, I wasn't able to see it. Of course, the Prosecutor asked Raymond Forchion if he had grown in height since the night of the attack, and he answered that he didn't know. Well, of course, I don't know either. I don't know whether Raymond Forchion has grown in height since the night of the attack. But, certainly, I say to you, ladies and gentlemen,

that there visibly—there wasn't enough difference between the height of Raymond Forchion and the height of Esaw Mitchell for us to say that that was significant, or that Esaw Mitchell was taller, even, than Raymond Forchion, and, of course, all of the co-defendants mentioned in the indictments weren't even here for comparison.

As to whether Esaw Mitchell was darker than any of the rest, we don't know that, either. All of the defendants aren't here. Looking at them now, there is some little difference. Of course, it is a little difficult. I guess in the three of us, the two defendants and me, there is some difference in color, of course, but, whether there is enough for that to be significant, for that to stand out, in the dark—in the dark—and everybody says it was very dark that night, no lights—how anybody could say, even between the three of us, let alone between the five men that are supposed to have been there, how Esaw Mitchell was so much darker than anybody else, that that is what fits the fact that that man that night and Esaw Mitchell, the defendant, today, are one and the same person, I submit to you isn't significant.

Whether he has a round face, that, of course, is a relative term, as you look at it, whether you call his face round. Now, of course, I have a round face. It seems to me if somebody was going to identify me, they would say, 'He's got a fat face.' I thnk we can all agree on that. But, whether Esaw Mitchell's face is a round one, I don't know, but that was the description that Miss Achey gave of Esaw Mitchell.

I ask you, from a description that he was darker than anybody else, that he was taller than anybody else, and that he had a round face, do you think such a description as that would permit any policeman, no

matter how smart he was, to go and pick out a man?

Finally, on this matter of identification, you ladies and gentlemen for five days now have had an opportunity off and on, at least, to look even at these two defendants—not five, but two. You have been sitting there, they have been sitting here. You have had an opportunity to look at them for almost five days, off and on, for five days, in the light. Now I am wondering if some time when we had come in the courtroom they had changed places, so that Esaw Mitchell was sitting at the end of the table and Robert Lewis was sitting next to me, I am wondering if you would even notice it, if there is so much difference even between their appearance that it would stand out, in the light, and I ask you, ladies and gentlemen, whether there is enough difference between even just the two, not five, that in the dark that a difference could be seen to the point of permitting a positive identification.

Now, ladies and gentlemen, that, I think, is really the crux of this case."

After comment on another matter, Mitchell's attorney purported to explain why Mitchell did not testify:

"I am sure also that the Prosecutor is going to make a point of the fact that Esaw Mitchell didn't take the stand to testify in his own defense. I am sure he is going to say that, because any good Prosecutor would say that.

The decision for Esaw Mitchell not to take the stand was my decision, rightly or wrongly. If he took the stand, I believed he would be accused of lying. The Prosecutors almost always do accuse a defendant of lying in a criminal trial. So, I decided that, rather than have to divide my comment between whether or not Esaw Mitchell was lying and the loose ends or weaknesses in the State's case, I would rather just concen-

trate on the fact that the State has not proved this case against Esaw Mitchell beyond a reasonable doubt. That was my decision, and I think that if the other defendant, Robert Lewis, is accused of lying, that no doubt, perhaps, at least, my decision may be justified."

It was in response to these comments that the prosecutor spoke to the jury as follows:

"Referring now to the defendant, Esaw Mitchell, the Judge's comment concerning the quality of defense counsel was valid. Mr. Johnson is good. But, I want to point out something to you, and you just think a minute, and see whether or not you are judging Esaw Mitchell or whether you are judging Robert Johnson, because, if you are judging Robert Johnson, then you have seen goodness and you have seen a good, responsible human being.

Why do I say that?

Well, I say it because you don't know Esaw Mitchell. You heard nothing from Esaw Mitchell. You have never seen him on that stand, so that you have an opportunity to judge his demeanor and what he is; and, who has the right to say, who has the right to say that Esaw Mitchell knew that he was recognized when he ran, and who has the right to say that Esaw Mitchell knew that Raymond Forchion was recognized when Esaw ran? Robert Johnson? No. It has to be Esaw Mitchell, and there is your smoke screen."

* * * * * * * * *

"And what about the failure of Esaw Mitchell to take the stand?

Well, it's nice for his lawyer to come up and say, 'Well, this was my decision,' but, remember this, he is as smart as I am, and I think the purpose of it was exactly what I outlined to you, and that is that you

wouldn't judge Esaw Mitchell, you would be judging what you heard from Robert Johnson, and there is the mark of an excellent advocate, but, I don't think he has fooled you. I don't think he has fooled you.

You are entitled also under the law of this State to consider, if you so desire, that Esaw Mitchell's failure to take the stand was because he couldn't deny the incriminating evidence proved against him, and, if I understand it, there is no evidence in Mitchell's defense, because I get the distinct impression that Forchion is Lewis' witness, and this is the way he has been referred to."

Except for the italicized sentence, the prosecutor's remarks constituted a fair response to the arguments made by counsel. Had the trial judge not erroneously charged on the consequences of Mitchell's failure to testify, the italicized language by the prosecutor—uttered in the midst of an otherwise fair rebuttal—would present a difficult issue. First, these comments may not rise to the "constitutional proportions" found by the majority. But even if the quoted sentence did raise a constitutional problem, it might well be subject to the rule of harmless error under the doctrine enunciated in Chapman v. California, 386 U. S. 18 (1967); see also *Harmless Constitutional Error: A Reappraisal,* 83 Harv. L. Rev. 814 (1970). As the majority opinion ably demonstrates, however, the statements by the trial judge alone constitute a sufficient basis for reversal of Mitchell's conviction. Accordingly, we need not, and in my view should not, reach the issue whether the remarks by the prosecutor amount to reversible error.

Judge Van Dusen concurs in this opinion, but goes further in stating his view that the language of the prosecutor was not reversible error of constitutional proportions on this record.

McLAUGHLIN, *Circuit Judge*, dissenting.

On June 15, 1964, appellant was convicted by a Superior Court, Camden County jury of rape, kidnapping, atrocious assault and battery, and possession of a concealed weapon. His conviction was affirmed by the Appellate Division of the New Jersey Superior Court by opinion dated April 26, 1966; the New Jersey Supreme Court denied certification on November 15, 1966.

An outline of certain of the facts is essential to an understanding of the issue raised by appellant. Seven defendants were accused of attacking a young couple parked in an automobile in a relatively out-of-the-way location. The boy, allegedly, was beaten, and the girl dragged off to another vehicle, driven to a dark-secluded area, and raped three times. Five of the defendants were immediately arrested, and convicted. Appellant Mitchell and one other defendant (with whom we are not here concerned) were apprehended some months later, tried together and convicted subsequent to the conviction of the five.

At trial, although his co-defendant testified and called as a witness one of the previously convicted defendants (Raymond Forchion), appellant did not testify or call any witnesses. However, in cross-examining Forchion, appellant's attorney asked both Forchion and appellant to stand side-by-side before the jury to demonstrate their similar appearances. (Trial Tr. 151-152.)

On summation, defendant's counsel contended that the victim was mistaken in identifying Mitchell as one of those who dragged her to the car of the defendants (Tr. 87) and raped her (Tr. 5); he argued that the scene of the rape was very dark, and that the victim, having been beaten and raped just prior to the alleged Mitchell rape, was greatly overwrought. Defense counsel suggested that the victim had mistaken Mitchell for one of the other defendants since Mitchell resembled the co-defendant being then tried with Mitchell (Tr. 268-269), and further, looked like Forchion

(Tr. 266) with whom Mitchell had been compared, side-by-side, before the jury (Tr. 152).[1] (Forchion testified that Mitchell had left the group prior to the rape.)—Defense counsel also, in summing up, called the jury's attention to the fact that he, defense counsel, had decided not to call appellant Mitchell as a witness in order to in effect forestall an anticipated attack by the State on Mitchell's credibility.

The prosecutor, in summation, did comment on the failure of Mitchell to take the stand, and his failure to deny the charge. (Tr. 305, 306, 307, 312). The court, in charging the jury, used the then standard phrase that ". . . by his silence the jury may infer that he (Mitchell) could not truthfully deny the charge." (Tr. 349).

I.

The rule of *Griffin v. California,* 380 U. S. 609 (1965), barring comment on a defendant's failure to take the stand, would govern our issue but for the exceptional trial circumstances. In those circumstances the comments of the State and trial court on appellant's failure to take the stand were justified. Although Mitchell was not sworn, his testimonial act of standing next to Forchion for comparison purposes was indisputedly intended to refute the State's evidence identifying Mitchell as one of the perpetrators of the crimes charged. Defense counsel reminded the jury in his summation that all of his questions to the rape victim ". . . were directed to whether or not she could actually identify Esaw Mitchell as one of her attackers. . . ." (Tr.

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[1] Counsel for appellant at trial in addition argued that another co-defendant, a female convicted at the earlier trial, testified for the State that Mitchell was at the scene of rape only because she hoped to receive a pardon or other leniency.

258). He argued at length the question of whether the victim correctly identified Mitchell (Tr. 258-269), and reminded the jury:

> "Now, when, . . . Forchion was produced by the (co-)defendant . . . , just before he (Forchion) left the stand and you may recall also that I asked him to come down and stand beside Esaw Mitchell, I hope some of you recall that. Now, if there was any difference between the height of these two men, I wasn't able to see it. Of course, the Prosecutor asked . . . Forchion if he had grown in height since the night of the attack, and he answered that he didn't know. . . . I don't know whether . . . Forchion has grown in height since the night of the attack. I don't know whether . . . Mitchell has grown in height . . . But, certainly, I say to you . . . that there visibly . . . there wasn't enough difference between the height of . . . Forchion and th height of . . . Mitchell for us to say that was significant, or that . . . Mitchell was taller, even, than . . . Forchion, and, of course, all of the co-defendants mentioned in the indictments weren't even here for comparison." (Tr. 266-7).

Counsel continued to press the identification issue, and concluded: "Now, ladies and gentlemen, that, I think is really the crux of the case." (Tr. 269). From the foregoing, it is clear that the alleged faulty identification of Mitchell by the victim and the comparison of Mitchell and Forchion before the jury were without doubt the key defense strategy. By that testimonial act in demonstrating to the jury the similarities in appearance of Forchion and Mitchell to each other the latter was attempting to refute at least part of the State's identification evidence.

The situation is essentially comparable to the circumstances of United States ex rel. *Fioravanti v. Yeager*, 404 F. 2d 675 (3 Cir. 1968), cert. denied 396 U. S. 860 (1969). There, the identity of the defendant was also strongly con-

tested. Although Fioravanti did not take the stand, defense counsel—after getting a police officer to admit on the stand that defendant Fioravanti appeared to be the same size as he was at the time of his arrest—had Fioravanti retire to the jury room, and put on a pair of trousers which the police took from the alleged thief at the time of the arrest. (Those trousers had paint particles on them which were, according to the evidence, identical to the paint on the safe in question, and were marked in evidence.) Fioravanti then returned to the courtroom, stood before the jury, removed his sweater, and as counsel summed up ". . . you could have put two Fioravantis in the waistband of the trousers when he stood before . . . (the jury) with the drooping drawers. . . ." Fioravanti, supra, at 676. Just as in the instant appeal, the question of the identity of the defendant was vitally important to the defense theory in Fioravanti. We held regarding the courtroom demonstration by defendant Fioravanti that:

> "The net result of the carefully planned action of appellant was substantial proof in his favor which at the time eliminated the very real danger of . . . (the defendant) taking the witness stand and exposing himself to ruinous cross-examination." At 677.

Our ultimate conclusion in Fioravanti was that under the trial circumstances, comment on the failure of the defendant to deny or explain the State's evidence did not violate the Griffin rule. As Judge Weinstein recently said in *United States ex rel. Miller v. Follette*, 278 F. Supp. 1003 (E. D. N. Y.), aff'd, 397 F. 2d 363 (2 Cir. 1968), cert. denied, 393 U. S. 1039 (1969):

> ". . . [T]he privilege against self-incrimination—important as it is—is not absolute. It must yield to some practical considerations and be subject to compromise where other important interests conflict.
>
> * * * * * * * *

> ". . . [W]ere (a) defendant allowed to give what is for all practical purposes, testimony without being subject to some check, the jury might be misled." At 1007.

While in the Miller trial defendant appeared pro se and used his position as advocate to orally testify directly to the jury, without taking the stand, the principle enunciated by Judge Weinstein completely applies to our situation. He correctly pointed out the need to balance, in each particular set of trial circumstances, the Fifth Amendment privilege against self-incrimination, and the State's rights when faced with a defendant's unsworn testimonial evidence or demonstration. In short, a defendant cannot and should not have it both ways. Hence the comments by the prosecutor and court, viewed in the context of appellant Mitchell's testimonial demonstration to the jury, were not improper

II.

Even more persuasive is the State's contention that after defense counsel commented in his summation on Mitchell's failure to take the stand, and tried to explain to the jury why he elected not to call Mitchell as a witness, the State had a right to refute the argument of defense counsel. The latter said:

> "I am sure also that the Prosecutor is going to make a point of the fact that Esaw Mitchell didn't take the stand to testify in his own defense. I am sure that he is going to say that, because any good prosecutor would say that.
>
> "The decision for Esaw Mitchell not to take the stand was my decision, rightly or wrongly. If he took the stand I believed he would be accused of lying. The Prosecutors almost always do accuse a defendant of lying in a criminal trial. So, I decided that, rather than

> have to divide my comment between whether or not Esaw Mitchell was lying and the loose ends and weaknesses in the State's case, I would rather just concentrate on the fact that the State has not proved this case against Esaw Mitchell beyond a reasonable doubt. That was my decision. . . ." (Tr. 273-4).

In response to defense counsel's statement, the Prosecutor answered this as follows:

> "And what about the failure of Esaw Mitchell to take the stand?
>
> "Well, it's nice for his lawyer to come up and say, 'Well, this was my decision,' as smart as I am, and I think the purpose of it was exactly what I outlined to you, and this is that you wouldn't judge Esaw Mitchell, you would be judging what you heard from . . . (defense counsel), and there is the mark of an excellent advocate, but, I don't think he has fooled you." (Tr. 306-7).

As Judge Learned Hand said long ago, when defense counsel in summation stated ". . . that the jury had heard all the testimony 'and the defendants, if they took the stand, could not add anything . . .', . . . surely he surrendered any privilege they had not to testify. He could not in justice ask that the prosecutor must accept his version unchallenged." United States v. Feinberg, 140 F. 2d 592, 595 (2 Cir.), cert. denied, 322 U. S. 726 (1944).[2] The opin-

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[2] In a federal prosecution, the prohibition against comment on a defendant's failure to waive his Fifth Amendment rights by taking the stand goes back to the Act of March 16, 1878, 20 Stat. 30, c. 37 (18 U. S. C. §3481). **Wilson v. United States,** 149 U. S. 60 (1893); **Griffin v. California,** 380 U. S. 609, 612 (1965). And it pertains equally to comment on behalf of the prosecution and comment on behalf of the defense.

ion in *Baker v. United States,* 115 F. 2d 533 (8 Cir. 1940); cert. denied, 312 U. S. 692 (1941) sharply defines the same sound, fundamental principle at page 544[3]:

> "Counsel may make any argument which is based upon evidence or reasonable inferences therefrom and may reply to argument of opposing counsel, and in so doing so may make statements which might otherwise be improper. . . . The Fifth Amendment and the statute, 28 U. S. C. A. §632 (now, 18 U. S. C. §3481), protect the defendant in a criminal prosecution in the right to remain off the witness stand, and prosecuting attorneys may not comment on the fact that the accused may have availed himself of that right . . . , but fair response to argument of counsel for the accused does not violate the Constitution nor the statute." (Citations omitted.)

And finally, an analogous situation arose in *Babb v. United States,* 351 F. 2d 863 (8 Cir. 1965). There defense counsel told the jury that the failure of the defendant to take the stand was counsel's decision, and if counsel made a mistake in not calling the defendant, the jury should blame counsel, but not hold it against the defendant. The Court in ruling on this proposition said:

> "In explanation of this failure to testify, defense counsel implied that the defendant could satisfactorily explain his involvement but such was unnecessary in view of the infirmity of the government's case. Defense counsel concluded his comment by admonishing the jury not to condemn defendant but instead blame his attorney for the selection of a purely legal tactic. *The direct reference to defendant's failure to testify with the accompanying explanation was an invitation to the prosecutor to comment upon the subject and does not demand reversal."* At 867-8. (Emphasis supplied.)

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[3] See also, **Edwards v. Patterson, 249 F. Supp. 311, 314 (D. Col. 1965).**

Similarly in this action, the State, after defense counsel first broached the subject of defendant Mitchell's not taking the stand and attempting to explain why he did not call Mitchell as a witness, could, and did, properly reply thereto.

The theory for reversal here must, not only rely on the proposition that Griffin governs the trial situation before us but also nullify Fioravanti, an even stronger factual case in the same area as this appeal. The net result is to permit a totally vulnerable, concocted defense maneuver to avoid having the defendant sworn as a witness and thus subject himself to a proper and devastating cross-examination. In its stead, as was done in this trial and in Fioravanti, the defendant visually and orally through his attorney, projects his sole affirmative defense to the jury, untouched and, according to the court opinion, untouchable by the prosecutor. I venture to suggest that this is a giant step backward in the administration of justice in the federal courts. I think it very clear that Mitchell's Fifth Amendment rights were not violated at his trial. I would affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.